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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 14, 2004

Case No.: TIA-0253

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be granted.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a filter testing technician, power operator and laborer at the Savannah River Site (the plant). He worked at the plant for approximately 20 years, from 1983 to 2003.

The Applicant filed an application with DOL under Subpart B. The DOL referred the matter to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction.

The Applicant filed an application with OWA, requesting physician panel review of his laryngeal cancer. The Applicant claimed that his illness was due to exposures to toxic and hazardous materials at the plant. The Applicant elected to have his claim presented to the Panel without awaiting the results of the NIOSH dose reconstruction.

The Physician Panel rendered negative determination for the Applicant's laryngeal cancer. The Panel cited the lack of exposure information and cited the "site analysis" as "non-contributory." The Panel attributed the condition to the Applicant's smoking history. See Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In his appeal, the Applicant disagrees with the Panel's finding that he was not exposed to toxic substances. He states that he was exposed to acid mists, coal dust and asbestos. The Applicant also states that his cancer is a rare type of cancer not associated with smoking. See Applicant's Appeal Letter.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant has demonstrated error. Although the Panel referred to the "site analysis" as "non-contributory," the record contains a description of the duties and possible exposures associated with the Applicant's job titles. See Record at 87-89. The description cites exposures, including acid mists, coal dust and asbestos. Accordingly, the Panel's reference to the "site analysis" as non-contributory suggests that the Panel did not consider the Applicant's potential exposures. Accordingly, further consideration of this application is warranted. Further consideration should also include review of (i) the site profile, (ii) the NIOSH dose reconstruction if it is complete, and (iii) the Applicant's argument that his type of cancer is rare and not associated with smoking.

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's decision grant of this appeal does not purport to dispose of the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0253, be, and hereby is, granted.

- (2) The Physician Panel Report did not consider all documents. Reconsideration of the Applicant's claimed laryngeal cancer is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 11, 2005